apparent conflict. In his work on sales (§ 634) Mechem says the "true view would seem to be that the loss follows the title." In *Cobb* v. *Tufts,* 2 Willson, Civ. Cas. Ct. App., § 152; *Arthur & Co.* v. *Blackman,* 63 Fed. 536; *Randle* v. *Stone,* 77 Ga. 501, it was held that the loss must fall on the vendor. The principal case has much authority in its favor. In *Burnley* v. *Tufts,* 66 Miss. 48, 5 So. Rep. 627, 14 Am. St. Rep. 540, the court said: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay." In the principal case the court says: "The real and substantial nature of the transaction, for the purpose of determining who should bear the loss, is that of mortgagor and mortgagee, or lienor and lienee. The contract, it is true, creates technically a conditional sale, but the vendor, in fact, only retains the legal title as a security in equity, and the title otherwise passes to the vendee with a lien for the purpose named." Following *Burnley* v. *Tufts,* supra, are *Tufts* v. *Griffin,* 107 N. C. 47, 12 S. E. Rep. 68; *Osborn* v. *South Shore Lumber Co.,* 91 Wis. 526, 65 N. W. Rep. 184; and the recent case of *Jessup et al.* v. *Fairbanks, Morse & Co.,* 38 Ind. App. 673, 78 N. E. Rep. 1050.

SALES—SEPARABLE CONTRACTS—MONTHLY DELIVERIES.—The parties entered into a written agreement whereby the defendant was to sell to plaintiff all the coal it mined during the year. The plaintiff agreed to accept and pay for the same at a certain rate per ton, payments to be made each month for the coal delivered during the month immediately preceding. Later defendant refused to deliver any more coal and, in a suit brought against it for the resulting damages, it defended on the ground that plaintiff had failed to pay for the coal as agreed and that, by reason thereof, the contract was abrogated and defendant was released from the terms thereof. *Held,* that the contract was separable, so that plaintiff's failure to pay for coal delivered during any one month did not authorize defendant to rescind, but that defendant was only entitled at the end of each month to sue for the price of coal previously delivered. *Tuttle-Chapman Coal Co.* v. *Coaldale Fuel Co.* (1907), — Ia. —, 113 N. W. Rep. 827.

The case follows the English doctrine as settled by *Simpson* v. *Crippin,* L. R. 8 Q. B. 14, viz., that the breach of one part of a divisible contract does not go to the whole consideration, and does not give the injured party the right to rescind the whole contract. The American cases are hopelessly in conflict, although the case of *Norrington* v. *Wright,* 115 U. S. 188, has probably cast the weight of authority in favor of the rule that the failure on the

part of one party to perform a separable part of a contract justifies the other in rescinding the entire agreement. The latter case decided that the failure of a vendor to deliver as much iron in one installment as required by the contract, released the vendee from all obligations under the agreement. It will be noted that the case involved the breach by the vendor of the agreement to deliver and not the failure of the vendee to pay for an installment. *Mersey Steel & Iron Co.* v. *Naylor,* 9 App. Cas. 434, was a case involving the identical question involved in the principal case, and was much relied on by the plaintiff in *Norrington* v. *Wright,* supra. Justice GRAY, in distinguishing that case from the one then before the court, said: "But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery, does not, unless circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it." It would seem that there might have been some doubt what the court would have decided had the breach consisted in the vendee's failure to pay instead of the seller's failure to deliver. The principal case relied on the cases of *Hansen* v. *Consumer's Co.,* 73 Ia. 77; *Osgood* v. *Bauder,* 75 Ia. 550; *Myer* v. *Wheeler,* 65 Ia. 390; and *Iowa Brick Manufacturing Co.* v. *Herrick,* 126 Ia. 721. All the cases except *Myer* v. *Wheeler* were decided after *Norrington* v. *Wright,* supra, and all, including *Myer* v. *Wheeler,* involved the failure by the vendee to pay for an installment as agreed. It is interesting to note that the Indiana court, in the case of *Ohio Valley Buggy Co.* v. *Anderson Forging Co.,* — Ind. —, 81 N. E. Rep. 574, and noted in 6 MICH. LAW REV. 268, came to the very opposite conclusion on exactly similar facts.